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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 1154

UNITED STATES OF AMERICA,
Petitioner,

v.

MODERN REED AND RATTAN COMPANY, INC., and ACHILLE GIANNASCA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF

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Opinion Below

The opinion of the Circuit Court of Appeals (R. 442-445) has not yet been reported.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

In a prosecution for a second offense under Section 16(a) of the Fair Labor Standards Act, is a prior offense an ingredient of the second offense so as to require that it be pleaded in the information and proved at the trial?

Statute Involved

Section 16(a) of the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 1608 (29 U. S. C. 216), reads as follows:

> "Sec. 16(a). Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection."

Statement

Respondents were convicted in the United States District Court for the Southern District of New York on May 13, 1946 after trial before a jury upon an information charging them with violations of Section 15 of the Fair Labor Standards Act (R. 43). On May 29, 1946, the Court imposed a sentence of three months' imprisonment and a fine of $1300 upon respondent Giannasca, and a fine of $1300 upon respondent corporation (R. 409). The information contained 32 counts, each of which alleged that on November 11, 1941, in the Southern District of New York, respondents pleaded guilty to violations of the Fair Labor Standards Act and were sentenced to pay fines, and that respondent Giannasca was placed on probation for a year (R. 5-42).

In his opening to the jury, the United States Attorney informed the jury that respondents had pleaded guilty on a prior occasion to an information charging violations of a similar nature to those for which they were then on trial (R. 48). As the Government's first two exhibits at the trial, there were offered and received in evidence the judgments of the United States District Court for the Southern District of New York of the prior convictions of respondents, showing the fines imposed upon them and the probation term imposed upon respondent Giannasca (R. 411-412).

Respondents appealed from the judgments of conviction to the Circuit Court of Appeals for the Second Circuit (R. 436) which reversed the judgment on the ground that the prior convictions had been improperly admitted in evidence and remanded the cause for a new trial (R. 445).

Argument

A defendant in a criminal trial is entitled to be tried only for the offenses with which he is charged, and may not be tried for other offenses (*Boyd* v. *U. S.*, 142 U. S. 450).

Under Section 16(a) of the Fair Labor Standards Act, there is no warrant or requirement that a prior conviction of the defendant be pleaded or proved in a prosecution for a second offense. That section defines a single crime. It does not define a different or more grievous crime for a second offense. Section 16(a) of the Act prescribes the penal sanctions for violations of the Act in its first sentence. It nowhere prescribes greater penal sanctions for a second violation of the Act.

It is undoubtedly the law that a statute which specifies one penalty for a first offense and a mandatorily severer penalty for a second offense defines two different offenses. The first offense under such a statute is an ingredient of the second offense and must be pleaded and proved in the

prosecution for a such second offense if the more severe penalties for the second offense are sought to be applied.

Examples of such statutes are the National Prohibition Act and the Baumes Law of the State of New York. Under the National Prohibition Act it was provided that "Any person violating the provisions of any permit * * * or violates any of the provisions of this chapter * * * shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment." Appellee argues by analogy to this statute that a prior conviction is an essential ingredient of the second offense and must be pleaded and proved in a prosecution for a second offense.

Under the National Prohibition Act, three different offenses were defined by statute and different penalties were imposed for each. A first offense carried a fine of not more than $500, a second offense, a fine of not less than $100 and imprisonment for not more than ninety days, any subsequent offense, a fine of not less than $500 and imprisonment for not less than three months. Congress decreed that a second offense was of greater gravamen than a first offense, and a subsequent offense more grievous than a second offense. Similarly, the Baumes Law of the State of New York prescribes greater punishments for crimes if the criminal has before been convicted of a felony or felonies. (Section 1941, Penal Law, McKinney's Consolidated Laws of New York, Annotated, p. 425.) Examples of the application of the rule requiring pleading and proof of a first or second offense under the National Prohibition Act upon a prosecution for subsequent offenses are con-

tained in the cases cited at page 7 of the petition. Each of these cases justifies the pleading and proof of the prior offense by reference to the mandate of the statute and the definition therein of different offenses depending upon whether or not the defendant has been convicted of a first, second or subsequent offense.

The application of second offenders acts, such as the Baumes Act, is demonstrated in *Graham* v. *West Virginia*, 224 U. S. 616, cited by petitioner. There, the defendant was arraigned upon an information reciting that he had previously been convicted of a felony, and had thus incurred the severer penalties imposed upon second offenders. This Court held that the defendant suffered no deprivation of any constitutional right by reason his being more severely punished as a second offender. The case has no application to the instant question since the instant statute does not prescribe severer penalties for a second than for a first offense.

The rule applicable to cases in which a second or subsequent offense carries heavier punishment is stated as follows:

> "If the offence is the second or third and by reason thereof the punishment is to be made heavier, this fact must appear in the indictment. * * * Still there is no reason why the law should not, as in some localities it does, permit this matter to be withheld from the jury or even omitted from the indictment until the prisoner has been convicted of the offence itself. * * * A course like this is specifically fair to the prisoner as preventing a prejudice against him by the jury from the former conviction which is not legal evidence." (Bishop, Criminal Law, 9th Ed., Vol. 1, § 961.)

While recognizing the practice of pleading and proving a prior conviction upon the prosecution of a second offender where the statute prescribes greater penalties for second offenses, Wharton disapproves of the policy as invading a

well-settled safeguard of justice that the defendant is to be tried "not for being generally bad, but only for the one particular bad act." (Wharton's Criminal Law, 7th Edition, Vol. 3, Sec. 3418.)

A statute providing for severer punishment on conviction for second offense is highly penal and must be strictly construed. (*U. S.* v. *Lindquist*, W. D. N. D. 1921, 285 Fed. 447, 448.) Those statutes prescribing mandatorily severer penalties for second offenses must be distinguished from the instant statute, which prescribes a single penalty whether the offense be a first, second or subsequent offense. The second sentence of Section 16(a) of the Act reading "No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection" is read by the petitioner as if it mandatorily prescribed a greater penalty for a second or subsequent offense than for a first offense. The statute cannot be so read. The second sentence of Section 16(a) is a mere restriction upon the Court's power to punish a first offense against the Act. The quoted second sentence of the Act does not create a more grievous offense with greater mandatory penalties and has no relevancy whatever to the definition of any offense. The restriction contained in the quoted sentence is exactly analogous to the restrictions frequently imposed upon the power of a Court to send a minor offender to a state prison. This restriction upon the power of the Court does not mean that the offense of which the minor has been convicted is a different offense from that for which an adult might have been convicted, but has reference only to the power of the Court to dispose of a defendant after he has been convicted.

An instance of the restriction upon the power of the Court to punish minors is contained in Section 2194 of the Penal Law of the State of New York (McKinney's Con-

solidated Laws of New York, Annotated, p. 626), reading in part as follows:

> "A child under sixteen years of age committed for misdemeanor, under any provisions of this chapter, must be committed to some reformatory, charitable or other institution authorized by law to receive and take charge of minors."

It cannot logically be argued that there is any difference in the crime of a child under sixteen years of age because there is a restriction upon the manner of his punishment. It cannot with any greater logic be argued that a first offense under the Fair Labor Standards Act is any different from a second offense because there is a restriction upon the manner of the punishment of the first offense. The Fair Labor Standards Act defines only a single offense and nowhere attributes greater gravamen to a second offense than to a first. The same penalty is prescribed for either. There is no requirement that the Court impose any more severe penalty upon a second offender than upon a first offender. This has been left by the Act to the discretion of the Court and is of no concern to the jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP S. AGAR,
Counsel for Respondents.